

**A Co-operative Central Bank Ltd & Anor v
Railway Co-operative Multi-Purpose Society Ltd**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOW-02-734
OF 1995

B SHAIK DAUD, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
4 FEBRUARY 1999

Civil Procedure — Interlocutory proceedings — Application for leave to intervene — Whether at the discretion of court — Whether party intending to intervene must have some interest in the suit

C *Civil Procedure — Affidavits — Cross-examination of deponent of affidavit-in-support of application for leave to intervene — Application for leave to intervene pending before court — Whether application for cross-examination premature — When court should allow cross-examination*

D The respondent applied to cross examine one Harunarashid bin Haji Salleh, who had affirmed an affidavit-in-support of the appellants' application for leave to intervene in a suit between the respondent, the Railway Co-operative Multi-Purpose Society Ltd ('RCMPS') and Koperasi Belia Nasional Bhd ('Kobena'). It was contended by counsel for the appellants that: (i) the respondent's application to cross examine the deponent was premature as the appellant's application for leave to intervene was still pending before the High Court; (ii) it would be proper for the respondent to apply to cross examine the deponent only once the appellant's application for leave to intervene was granted; (iii) the affidavit-in-support was filed on 6 December 1994 whereas the application to cross-examine was only filed some seven months later, on 7 July 1995; and (iv) the truth of the facts deposed to in the affidavit-in-reply had not been denied or challenged by the respondent. Counsel for the respondent however submitted that the affidavit-in-support of the appellant's application was in general terms and hence the need to cross examine the deponent of the affidavit became important. The High Court allowed the respondent's application. Therefore, this appeal.

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Held, allowing the appeal with costs and ordering the deposit be refunded to the appellant:

H The granting or refusing of leave to intervene is in the discretion of the court. Where any party intends to intervene in a suit pending before the court, it must show that it has some interest in the suit. The court will rely on the affidavit-in-support to determine whether there exists such interest or otherwise. If the affidavit-in-support is in general terms and unsatisfactory, in all probabilities the court will reject the application (see p 676A-C).

I In this case, the respondent had not shown that there were disputes or facts in issue in the affidavit of the deponent to warrant him to be cross examined and as the application for leave to intervene

is pending before the court, it is premature to apply to cross examine the deponent of the affidavit in question (see p 676 E-F).

[Bahasa Malaysia summary]

Responden memohon untuk memeriksa balas Harunarashid bin Haji Salleh, yang telah mengikrar satu affidavit sokongan kepada permohonan perayu untuk kebenaran untuk mencelah di dalam tindakan antara responden, Persatuan Koperasi Keretapi Serba Guna ('PKKSG') dan Koperasi Belia Nasional Bhd ('Kobena'). Adalah ditegaskan oleh peguamcara perayu bahawa: (i) permohonan responden untuk memeriksa balas deponen adalah terlalu awal kerana permohonan perayu bagi kebenaran untuk mencelah masih belum didengar di hadapan Mahkamah Tinggi; (ii) adalah wajar bagi responden untuk memohon untuk memeriksa balas deponen hanya selepas permohonan perayu untuk kebenaran untuk mencelah telah diberikan; (iii) affidavit sokongan telah difailkan pada 6 Disember 1994 sementara permohonan untuk memeriksa balas hanya difailkan lebih kurang tujuh bulan kemudian, pada 7 Julai 1995; dan (iv) kebenaran di dalam fakta yang dideposkan di dalam affidavit jawapan belum dinafikan atau dicabar oleh responden. Peguam untuk responden sebaliknya berhujah bahawa affidavit sokongan bagi permohonan perayu adalah secara am dan oleh itu keperluan untuk memeriksa balas deponen menjadi penting. Mahkamah Tinggi telah membenarkan permohonan responden. Oleh itu, rayuan dibuat.

Diputuskan, membenarkan rayuan dengan kos dan juga mengarahkan deposit dipulangkan kepada perayu:

Pemberian atau keengganan untuk memberi kebenaran untuk mencelah adalah budi bicara mahkamah. Jika ada pihak berniat untuk mencelah di dalam tindakan yang belum didengar lagi di hadapan mahkamah, pihak tersebut mestilah menunjukkan bahawa pihak tersebut mempunyai kepentingan di dalam tindakan tersebut. Mahkamah akan bergantung kepada affidavit sokongan untuk menentukan sama ada wujud kepentingan tersebut atau sebaliknya. Jika affidavit sokongan adalah berbentuk am dan tidak memuaskan, dalam segala kemungkinan yang ada, mahkamah akan menolak permohonan tersebut (lihat ms 676A-C).

Di dalam kes ini, respondent tidak menunjukkan bahawa terdapat pertikaian atau fakta dalam isu di dalam affidavit deponen untuk mewajarkan beliau diperiksa balas dan memandangkan permohonan untuk kebenaran untuk mencelah masih belum didengar di hadapan mahkamah, adalah terlalu awal untuk memohon untuk memeriksa balas deponen affidavit tersebut (lihat ms 676 E-F).

Notes

For a case on interlocutory proceedings, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2419.

- A For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Legislation referred to

- B Essential (Protection of Depositors) Regulations 1986 regulation 9(1)(b)

Murali Achan (Vijendran & Co) for the appellants.

A Kanesalingam (Kanesalingam & Co) for the respondent.

- C **Shaik Daud JCA** (delivering judgment of the court): This is an appeal against the decision of the High Court which had allowed an application by the respondent to cross examine one Harunarashid bin Haji Salleh who had affirmed an affidavit dated 6 December 1994, in support of the appellants' application for leave to intervene in a suit between the respondent, the Railway Co-operative Multi-Purpose Society Ltd ('RCMPS'), and Koperasi Belia Nasional Bhd ('KOBENA').

- D The background leading to the filing of the said affidavit are that RCMPS had filed a suit against KOBENA in 1989, claiming a sum of RM3,200,731.63 with interest owed by KOBENA. On 1 April 1992, a consent judgment for this sum was entered against KOBENA. When KOBENA failed to settle the judgment sum, RCMPS applied to the court to enforce the judgment dated 1 April 1992, by attaching certain shares belonging to KOBENA. The application was heard by the senior assistant registrar and was dismissed. Thereupon, RCMPS applied ex parte and obtained a Mareva injunction against KOBENA on 17 October 1994. The Mareva injunction was served on the appellants as the appellants held shares and other assets belonging to KOBENA. On 6 December 1994, the appellants applied for leave to intervene and that application is still pending before the High Court. It was in support of this application that Harunarashid bin Haji Salleh affirmed and filed the affidavit in question. He affirmed the affidavit in his capacity as one of the representatives appointed by Bank Negara for both appellants under regulation 9(1)(b) of the Essential (Protection of Depositors) Regulations 1986.

- G It was contended firstly by counsel for the appellants that the respondent's application to cross-examine the deponent of the said affidavit is premature as the application for leave to intervene is still pending before the High Court. He contended that once the application for leave to intervene is granted, then it would be proper for the respondent to apply to cross examine the the said deponent. Secondly, the said affidavit was filed on 6 December 1994 and the application to cross-examine was only filed on 7 July 1995, some seven months later. Furthermore, the truth of the facts deposed to in the said affidavit had not been denied or challenged by the said respondent. The respondent merely construed those facts differently. Therefore, there is no basis to cross examine the said deponent.

- I Learned counsel for respondent conceded that in order to intervene, a party must persuade the court that it has some interest and affidavit-in-support of such an application must show this. He, however, contended

that if the affidavit-in-support is unsatisfactory and is in general terms without condescending to particulars, the court would need further questions to be answered. Hence, the need to cross examine the deponent of such affidavit becomes important.

Now, whether to grant or refuse leave to intervene is in the discretion of the court. It is trite law that where any party intends to intervene in a suit pending before the court, it must show it has some interest in the suit. The court will rely on the affidavit-in-support to determine whether there exist such interest or otherwise. If as is conceded in this case, the affidavit-in-support is in general terms without condescending to particulars and therefore unsatisfactory, then in all probabilities, the court will reject the application. For the court to order cross-examination of the deponent of an affidavit-in-support, the respondent must challenge the truth of the averments in the affidavit. In the present case, no where has the affidavit-in-support of the application to cross examine specifically deny or challenge the facts deposed to in the said affidavit. For instance, the circumstances by which the appellants came to hold shares, particularly, the shares in United Merchant Group, belonging to KOBENA, was explained in the said affidavit-in-support affirmed by Harunarashid but nowhere has the affidavit-in-support of the application to cross examine affirmed by one Lim Say Hock, the secretary of RCMPS, has denied or challenged this; on the contrary, it would appear that the purpose of the cross-examination is to further their attempt to attach the shares. The matters averred to in Lim Say Hock's affidavit can be questioned after the appellants had been made interveners. It appears to us that by their application, the respondent is embarking on a fishing expedition.

We are satisfied that, the respondent has not shown that there are disputes or facts in issue in the affidavit of Harunarashid to warrant him to be cross examined and as the application for leave to intervene is pending before the court, it is premature to apply to cross examine the deponent of the affidavit in question. We allowed the appeal with costs here and below and ordered the deposit to be refunded to the appellant.

Appeal allowed.

Reported by Andrew Christopher Simon

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